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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-44

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SUPREME COURT, U.S.

ROBERT BURRELL, et al.

v.

MILTON McCRAY, et al.

RESPONDENTS' OPPOSITION TO MOTION NE RECIPIATUR

Respondents, through counsel, pursuant to Rule 35(4), Rules of the United States Supreme Court, hereby oppose Petitioners' Motion Ne Recipiatur and request that it be denied for the reasons stated herein. Petitioners request the Court to not receive, or in the alternative, to strike, Respondents' supplemental brief on the grounds that it does not comply with the provisions of Rule 41(5), Rules of the United States Supreme Court.

I. RESPONDENTS' SUPPLEMENTAL BRIEF CONTAINS LATE AUTHORITIES AND OTHER INTERVENING MATTERS THAT WERE NOT AVAILABLE IN TIME TO HAVE BEEN INCLUDED IN THEIR BRIEF IN CHIEF.

The judicial and administrative decisions which Respondents discussed in their supplemental brief were not available in time to have been included in their brief in chief which was filed on February 12, 1976. The final decree in Hopkins v. Collins, et al., __F.Supp.__, No. K-74-369 (D. Md. 1975), was signed by District Court Judge Kaufman on March 12, 1976, and the defendants' appeal was filed on April 9, 1976. In Stokes v. Institutional Board of Review of Patuxent Institution, et al., No. 45341-A

(Cir. Ct. No. 2 of Baltimore City), the court filed its Memorandum Opinion and Order on January 23, 1976. The decision would have been final after 30 days, and the defendants appealed on February 20, 1976, eight days after Respondents' supplemental brief was filed in the present case.

The administrative agency decisions of the Maryland Inmate Grievance Commission to which reference was made in Respondents' supplemental brief were filed between January 1, 1976 and April 13, 1976. Although perhaps some of those decisions made in January, 1976, could have been included in Respondents' brief in chief, in order to present a complete analysis of the Commission's decisions during the final quarter before argument in this case, it was necessary to wait until April 13, 1976, to gather the relevant information. The Inmate Grievance Commission decisions are therefore intervening matters not available in time to have been included in Respondents' brief in chief within the contemplation of Rule 41(5).

II. RESPONDENTS' SUPPLEMENTAL BRIEF DOES NOT RAISE NEW ISSUES.

The matters in Respondents' supplemental brief, do not raise new issues, but rather, they provide additional support for the arguments which Respondents have already presented in their brief in chief; specifically, that the Maryland Inmate Grievance Commission is an inadequate state remedy (Resp. Br. at 16, 70); that an exhaustion of state administrative remedies requirement in prisoner § 1983 actions will not result in any benefit to the federal courts (Id., at 44); and that if an exhaustion rule is to be imposed, it should be created not by this Court but by Congress. (Id., at 68).

The Maryland state remedy is clearly an inadequate remedy in all of the cases before the Court because it cannot award

damages and therefore, cannot grant any relief to Respondents.[1] The cases cited by Respondents in their supplemental brief directly affect Respondent Stokes and make it unnecessary for him to pursue his equitable claims. He has been transferred from the Maryland Penitentiary to Patuxent Institution and committed there as a defective delinquent for an indeterminate sentence. Stokes therefore has no present interest which is affected by Penitentiary censorship regulations. In addition, the identical constitutional challenges made by Stokes to those regulations have been decided in the Hopkins case. Whatever the outcome of the State's appeal, Stokes' equitable claim will be resolved.

The Inmate Grievance Commission decisions discussed in Respondents' supplemental brief were offered as additional support for their argument that the Commission is an inadequate state remedy whether a prisoner is requesting equitable relief or damages to vindicate his constitutional rights. Two principal purposes for application of the exhaustion of administrative remedies doctrine are to permit the agency to correct its own errors so that intervention by the courts is unnecessary and to assist the courts by allowing the agency to make a factual record, exercise its discretion or apply its expertise. The matters in Respondents' supplemental brief support their argument that none of these purposes would be served by causing these Respondents or any Maryland prisoners to resort to the Commission before proceeding in federal court.

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1 Petitioners' statement in their motion that Respondent Washington requested injunctive relief in his pro se complaint is not accurate. See, App. at 24la.

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In addition, the information presented in the supplemental brief demonstrates that Congress alone is uniquely able to decide the difficult questions of whether there should be an exhaustion requirement in prisoner § 1983 cases and if so, what may be considered an adequate state administrative remedy.[2] There are conflicting policy considerations that support and oppose an exhaustion requirement. They cannot be resolved without having a great deal more information from the States and the federal courts than is available in the record of the present case.

An even more difficult task is in setting standards and procedures for what is an adequate administrative remedy. The amicus brief supporting Petitioners indicates the wide variety of grievance mechanisms presently being used by many of the 50 separate state prison systems. The Court should not attempt to prescribe a due process model for State grievance procedures when such a task can be so appropriately accomplished by Congress. The flexibility of the States should not be restricted at this time when grievance mechanisms are in a stage of development and experimentation. On the other hand, the problem in setting

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2 Respondents have argued that this Court should defer to Congress on the question of whether exhaustion of state administrative remedies should be a requirement under § 1983. In Monroe v. Pape, 365 U.S. 167, 180 (1961), this Court stated that "[i]t is abundantly clear that one reason the legislation [§ 1979, the statutory predecessor to § 1983] was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the 14th Amendment might be denied by the state agencies." (emphasis added). Recognizing that § 1979 was enacted because of conditions existing in 1871, the Court found Congress intended that "[t]he federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." Id. at 183. If circumstances have in fact changed, and the rationale which existed in 1871 for a no-exhaustion rule is no longer valid, as Petitioners argue, then it is Congress which should re-evaluate its own legislative judgment.

only minimal procedural safeguards is that the States may be encouraged to create grievance mechanisms that do not protect the rights of prisoners. In addition, for a state remedy to be adequate, Congress may determine that the remedy should be of some real benefit to the federal courts.

Respondents' supplemental brief provides support for the argument that the Maryland Inmate Grievance Commission does little to assist the District Court in managing or reducing the number of complaints that are filed by prisoners. This may be the result of the Commission's initial investigation and screening procedures where 55 to 65% of all complaints received are dismissed without a hearing or written decision. Or, it may be because of the chaotic fact-finding and decision-making process which was the subject of a scathing dissent by Commissioner James V. Bennett in one case which appears in the Addendum to Respondents' brief. Also at fault may be the provision for review by the head of the Maryland prison system of all Commission decisions favorable to prisoners. His final decision can be based on evidence he gathers ex parte after the Commission hearing when the prisoner has no opportunity to rebut, present evidence of his own or even know of the Secretary's action. Clearly, in setting the standards for what is an adequate state remedy, Congress would want to consider the Maryland experience and compare it to other state procedures which appear to be more successful in resolving prisoners' grievances in a timely fashion.

III. CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that Petitioners' Motion Ne Recipiatur be denied.

Respectfully submitted,

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CHARLES F. MORGAN
PRISONER ASSISTANCE PROJECT
LEGAL AID BUREAU, INC.
341 North Calvert Street
Baltimore, Maryland 21202

CERTIFICATION

I HEREBY CERTIFY that on this 3rd day of May, 1976, I mailed postage prepaid, a copy of the foregoing Respondents' Opposition to Motion Ne Recipiatur to Francis B. Burch, Esq., Attorney General, One South Calvert Street, Baltimore, Maryland 21202.

CHARLES F. MORGAN

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